

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLANT**





To be argued by  
LAURENCE E. JACOBSON

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PLS

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**74-2207**

UNITED STATES OF AMERICA,

Appellee,

-against-

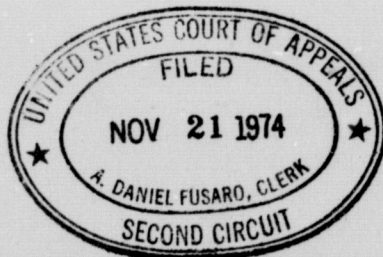
DEAN PETER VARVARIGOS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES  
DISTRICT COURT FOR THE SOUTHERN  
DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT  
VARVARIGOS

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UNITED STATES OF AMERICA,

Appellee,

-against-

DEAN PETER VARVARIGOS,

Defendant-Appellant.

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STATEMENT PURSUANT TO RULE 28(2)

PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction rendered September 9, 1974 in the United States District Court for the Southern District of New York (Pollack, J.) convicting Appellant Varvarigos after trial of conspiring to distribute and to possess with intent to distribute quantities of Schedule I and II controlled substances in violation of 21 U.S. Sections 841(a)(1), 841(b)(1)(a). Appellant was also convicted of unlawfully possessing with intent to distribute a Schedule III controlled Substance (phen-cyclidine) in violation of the aforementioned sections.



Appellant was sentenced to a term of three months imprisonment. Appellant is presently out on a personal recognizance bond pending the disposition of this appeal.

#### QUESTION PRESENTED

Whether, as a matter of law, the Government proved the existence of multiple conspiracies rather than a single conspiracy thereby mandating the dismissal of the instant indictment.

#### STATEMENT OF FACTS

Appellant Varvarigos and four co-defendants proceeded to trial on June 17, 1974 before the Hon. Milton Pollack on an indictment charging them with conspiring to distribute and to possess with intent to distribute quantities of Schedule I and II controlled substances in violation of Sections 812, 841(a)(1) and 841(b)(1)(a) of Title 21, U.S.C. Appellant Varvarigos and Defendant Flores were also charged with unlawfully possessing with intent to distribute a Schedule III controlled substance, to wit, phen-cyclidine.

MICHAEL STARBUCK, a supervisor for a market research company, testified that about one and a half to two years ago, he had entered into an agreement with a William Brandt, who was an employee in the same company, and others to smuggle cocaine into the country from South America. Starbuck had put up \$3000 for this cocaine and also paid for other incidental expenses for several people including himself to go to South America to buy the cocaine. He was thereafter apprehended and eventually pleaded guilty to this crime. (35-37)\*

On November 11, 1973, Starbuck met with Brandt in room 103 of the Village Plaza Hotel to discuss buying 100 pounds of marijuana or a smaller amount and finding sources to buy LSD. (33, 35-37) According to Starbuck, Brandt and his partner, Defendant Miley had been in the comic book business but since they lost their store space, they brought thousands of comic books to this hotel room. Starbuck could not recall whether Defendant Miley was present at this initial meeting. (38)

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\* Numerical references are to the pages of the trial transcript.



Subsequently on November 22, 1973, he and Brandt had another discussion at the hotel concerning the buying of acid from Brandt for \$650. Starbuck received a sample of the acid and was told by Brandt that his contact man, "John," would deliver the acid at a date yet to be determined. (40) He and Brandt also discussed buying acid in liquid form. (40) Again, Starbuck was not sure whether Defendant Miley was present at this meeting. (40)

On November 26, 1973, Starbuck stated that he told Agent Palumbo that he had made arrangements to buy 1000 units of LSD and if the Agents were interested, they could buy it from Brandt for \$600. (42) After the Agents decided that they would buy the acid, Starbuck was fitted with a Kel transmitter belt and went with Agent Nieves to the Village Plaza Hotel where he introduced Nieves to Brandt. (42) John Godinsky and Defendant Miley were also present at this time. (42) Godinsky showed Agent Nieves some acid on blotter paper, containing 100 dots per sheet. (43) Agent Nieves gave \$650 to Brandt and Brandt in turn gave an amount of money to Godinsky who at that point left the room. Agent Nieves then

discussed with Brandt the possibility of buying acid in liquid form. (43) He did not recall Defendant Miley saying or doing anything during this meeting. (44)

On December 5, 1973, Starbuck again met Brandt and the two of them drove to Jan Lang's place where arrangements were made to buy a drug called THC for \$1800. (44) Lang gave him a sample of the drugs and said that the arrangements would have to be made at another time for the sale. (45)

On December 13, 1973, Agents Palumbo and Nieves accompanied Starbuck to another of his meetings with Brandt. The four of them then drove to Defendant Flores' apartment at 501 East 11th Street. (46) Brandt and Starbuck left the car and entered the apartment first to meet with Defendant Flores and Appellant Varvarigos. Brandt told Flores that they had customers downstairs who would not front the money until they saw the drug, THC. (46) Appellant then interjected and asked Brandt if he trusted them and whether they were his friends. When Brandt responded affirmatively, Appellant said one of them could come upstairs. (47) Agent Nieves, who was chosen to go upstairs,



looked at the THC, weighed it on his own scale, and told Flores that his partner who was downstairs had the money. (48) Nieves then got the money and paid Brandt who in turn gave Flores some money. (48) During this time, Agent Nieves was discussing with Flores and Appellant how to put the THC up for distribution and how to cut it. (48)

Subsequently, on December 17, 1973, Starbuck went with Defendant Miley to Appellant's apartment where he discussed the possibility of buying cocaine. (50) Appellant stated that he could sell a part of a kilo of cocaine and gave Starbuck a sample of this drug. (50)

On January 4, 1974, Starbuck met with Brandt and together they went to Lang's place to make arrangements to buy LSD for \$1800 an ounce. (51) Thereafter, the Agents decided to buy this LSD. The three met at Lang's apartment with Brandt but Lang told them that he did not have the LSD, but his contact who lived only a few blocks away had it. (54) The agents made it clear that they would not advance any money without first seeing the drug. (54) It was then decided that the Agents would go with Lang

to his contact's house and Starbuck would return with Brandt to the latter's store. (55) The Agents later arrived at the store and gave Brandt \$200 representing his cut. (55)

SPECIAL AGENT NIEVES testified that on November 27, 1973 Starbuck came to their office to advise him and Agent Palumbo that he had made arrangements to purchase LSD from Brandt at 7:00 p.m. that evening. Starbuck also gave them the sample of LSD that he had obtained from Brandt. (182) Nieves gave Starbuck \$650 and fit him with a Tel transmitter. (184) He then went with Starbuck to Brandt's place at the Village Plaza Hotel where he was introduced as a customer and introduced to Defendant Miley and someone called John. (185) It was John who counted out ten sheets of blotter paper, each sheet containing 100 dots of this drug. (187) Nieves gave Brandt \$650 and out of that money, Brandt gave Godinsky some money. Nieves then inquired about the availability of the larger quantities of LSD at a more reasonable price. (187) After Godinsky left, Nieves, Brandt and Defendant Miley discussed future purchases. (187) Brandt told him about another drug



called THC which he could get at \$1800 an ounce. (188) Nieves told him that he would ask his customers if they could use this drug. (188)

Thereafter, on December 13, 1973, the two Agents and Starbuck again met with Brandt to purchase an ounce of THC for \$1800. (192) They all arrived at 501 East 11th Street but only Brandt and Starbuck entered the building. Fifteen minutes later, Starbuck came down and Agent Nieves then accompanied him up to the apartment which he later learned belonged to the Defendant Flores. He was introduced to both Flores and Appellant. He then examined some white powder, said it looked O.K., and obtained \$1800 from Agent Palumbo to make the purchase of THC. (197) Appellant told him that the best way to sell this drug was in capsule from which he could supply if it were needed. (198) Upon chemical analysis, this drug turned out to be PCP which is commonly known as a horse tranquilizer, instead of THC. (200)

On January 3, 1974, Agent Nieves called Brandt and asked if he had any LSD available and Brandt replied that he had 3850 dots at 5¢ a dot. (204) That night, he and Agent Palumbo went to make

this purchase. (204) The Agents purchased half of the supply for \$675 in the presence of Brandt, Godinsky and the Defendant Miley. They returned later that night to complete the purchase. (205-06)

On January 8, 1974, Nieves and Palumbo met Appellant at his apartment in Queens. (207-08) There they discussed the purchase of one pound of cocaine for \$16,000. Appellant informed him that his people had the goods and the only problem was the method of delivery. (208) They eventually agreed to consummate the deal at 6:00 p.m. at the Finast Supermarket in Queens. (209) However, an Agent was mistakenly arrested by the New York City Police at this location so the deal did not go through. (210)

On January 10, 1974, they again met Appellant to attempt the same deal with the cocaine. (211) It did not go down that evening either. (211) Prior to terminating the negotiations that evening, Appellant had given him a small sample of THC to see if he could use it. (211) Appellant, however, never produced any cocaine although he had boasted that the cocaine were like rocks as big as baseballs. (476) The Agents felt that they were on a wild goose chase in trying



to get the cocaine. (485) Palumbo even stated to Nieves that "I think this guy is trying to beat us out of the money." (487)

On January 15, 1974, Agent Nieves stated that he received a sample of purple haze from Starbuck. (213) On that date, he also had a telephone conversation with Starbuck in which he informed the Agent that he had received one table of LSD (purple haze) and that he made further arrangements with Brandt to purchase 4000 tablets that afternoon. Accordingly, Starbuck said that he would meet the Agents in the vicinity of East 16th Street and 1st Avenue at 2:00 p.m. (214) Nieves took \$1400 and together with Agent Palumbo met Starbuck who brought them to 160 First Avenue and introduced them to Lang. Lang told them that only two people could go to meet his connection. Therefore, both Agents went to 416 East 9th Street and met a man named Joe who gave them 2000 tablets for which Palumbo paid him \$600. (217) Joe told them that larger quantities would be available if they gave him advance notice. (216) The Defendant Wenzler was identified as "Joe." (218) The Agents thereafter met Starbuck, Brandt, and the

Defendant Miley at the comic book store at 224 East 10th Street where Palumbo gave Brandt \$200 commission. (219)

On February 6, 1974, the two Agents again met Brandt to inquire about the availability of a shipment of 50,000 LSD tablets which they ordered for \$16,000. Brandt told them that he would let them know when the drug arrived. (220)

On February 12, 1974, Nieves met with Defendant Miley and Brandt at the comic book store to inquire further about the aforementioned deal. (221) Brandt stated that Strider who was the connection was en route. (224) Brandt then informed Nieves that a token purchase would have to be made to show their good faith. (225) When Strider finally arrived, he produced 1800 dots of LSD for which Palumbo paid him \$660. (227) Strider at his request was shown the \$16,000. Strider then instructed them that they would receive only 10,000 dots at a time. (228) Shortly thereafter, he informed them that he could only get 10,000 dots which he showed to them. At that point, Strider was placed under arrest. (229) After advising him of his rights, Strider took them



to 56 East 4th Street where Defendant Goldstein answered the door. He also was arrested and when he consented to a search of his apartment, they found 4000 dcts of LSD. (230) After leaving that apartment, they arrested Brandt, Defendant Miley, and Defendant Wenzler. (236)

Agent Palumbo's testimony was essentially the same as that given by Agent Nieves.

At the conclusion of the trial, Appellant was found guilty as charged. (766-67)

#### ARGUMENT

##### POINT I

AS A MATTER OF LAW, MULTIPLE CONSPIRACIES WERE ESTABLISHED BY THE GOVERNMENT AND THEREFORE THE INDICTMENT AGAINST APPELLANT VARVARIGOS MUST BE DISMISSED.

The Court charged in effect that if the jury found that a multiple instead of a single conspiracy was established by the Government, Appellant Varvarigos and the other defendants must be acquitted. It is our position on this appeal that while generally the question of whether a

multiple conspiracy exists is a factual question for the jury to determine, this case presents a situation where as a matter of law there was a multiple conspiracy and therefore the charges against Appellant Varvarigos must be dismissed.

At the outset, it is clear that this is not a typical "chain conspiracy" as there is no division of labor ranging from the importation of drugs to the selling of the drugs to its ultimate consumers. *Blumenthal v. United States*, 322 U.S. 539 (1947); *United States v. Aviles*, 274 F.2d 179 (2d Cir., 1959), cert. den. 362 U.S. 974 (1960); *United States v. Agueci*, 310 F.2d 817 (2d Cir., 1962), cert. den. 372 U.S. 959 (1963); *United States v. Calabro*, 449 F.2d (2d Cir., 1971), cert. den. 405 U.S. 928; *United States v. Cirillo*, 468 F.2d 1233 (2d Cir., 1972); *United States v. Borelli*, 336 F.2d 376 (2d Cir., 1964); *United States v. Vega*, 458 F.2d 1234 (2d Cir., 1972).

In contrast to the usual narcotic conspiracy case where separate groups of importers, wholesalers, middlemen and retailers are chained together in one cooperative venture, each contributing to the success



of the whole, the evidence in the present case clearly established multiple conspiracies, each with its own source of supply, its own customers, its own core conspirators, and its own base of operations.

First, there were several different drugs involved in this case such as LSD, THC, PCP, and cocaine. With the exception of cocaine, the aforementioned drugs could be manufactured in any laboratory. Therefore, no inference can be drawn that the alleged conspirators had to assume that someone else was involved in importing the drug before the drugs reached them.

Second, it is clear that the activities of some conspirators had nothing whatever to do with the activities of others. While Brandt acted as the selling agents of different suppliers, many of the suppliers were not even aware of the existence of the other. In fact, it appears on this record that each supplier was interested only in promoting his own drug. They neither bought nor sold to each other and each pursued its own interests without concern or contribution to the success of the other. Thus,

Godinsky supplied LSD only for the Defendant Miley and Brandt. Lang supplied the drug THC to these men which he allegedly obtained from his connection Defendant Wenzler. Strider also was a supplier of LSD for Brandt and Defendant Miley and his connection was allegedly the Defendant Goldstein. Appellant Varvarigos and Defendant Flores in the meantime were obviously interested in promoting the drug PCP. Additionally, from this record it cannot be established whether Appellant was truly interested in selling the Agents cocaine or whether he was simply trying to "beat" them out of their money.

Even taking the view of the evidence in a light most favorable to the Government, there was a total absence of proof that Appellant had any connection with the Godinsky, Lang, or Strider enterprises. It was not shown that these groups either sold or distributed drugs to the other. Each was a separate chain conspiracy whose activities paralleled and competed with the other.

Furthermore, it was not established that the various groups had a common source of supply for their various drugs. Even though Brandt dealt with



each group. this does not mean that the various groups had any interest in contributing to the success of the venture of another group. The fact alone that the various groups were in the same business is a wholly insufficient basis for claiming a single conspiracy. *Kotteakos v. United States*, 328 U.S. 750 (1945).

Finally, it is important to note that the Government failed to demonstrate any cohesive or organized plan among co-conspirators. What the Government did show were many isolated transactions occurring at different times. They did not prove that "continuous involvement with each other" that "provided the common thread upon which the jury properly could find the single conspiracy charged." *United States v. Calabro*, *supra* at p. 893. There must be some nexus among the different parties to justify a finding of a single conspiracy and such nexus did not exist in his case.

Therefore, the trial court should have found as a matter of law that a multiple conspiracy existed and should have directed that the indictment against Appellant Varvarigos be dismissed.

POINT II

PURSUANT TO FEDERAL RULES OF APPELLATE  
PROCEDURE, RULE 28(i) ALL RELEVANT ARGU-  
MENTS RAISED IN THE BRIEFS FOR OTHER  
APPELLANTS ARE INCORPORATED BY REFERENCE.

CONCLUSION

FOR THE ABOVE STATED REASONS,  
THE JUDGMENT OF CONVICTION  
SHOULD BE REVERSED AND THE  
INDICTMENT DISMISSED.

Respectfully submitted,

LAURENCE E. JACOBSON  
Attorney for Defendant-Appellant



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